21.

No. 221.

Evening Post Job Printing House—N. Y.

Brf. of McKeen for P. E.

Filed Jan. 20, 1898.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 221.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* PARKE, DAVIS & COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES A. ROBERTS, COMPTROLLER OF THE STATE OF NEW YORK, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES MCKEEN, Attorney for Plaintiff in Error,
32 Nassau St., New York.

Statement of the Case.

The writ of error was sued out to review final judgment entered in the New York Supreme Court upon a remittitur from the Court of Appeals, confirming a tax imposed upon the relator, the validity of the statute and authority under it having been drawn in question as repugnant to the Constitution. The errors are formally assigned in the Record at page 39.

The facts are not in dispute, and are stated with substantial accuracy, in the opinion of the State Court, at page 28 of the Record.

Those which are material to the points here raised may be briefly recapitulated.

Parke, Davis & Co., the relators, are a corporation organized under the laws of Michigan solely for manufacture and sale of chemical and pharmaceutical preparations. Formerly they consigned goods of their manufacture to a drug house in New York for sale on commission. Wishing more exclusive attention given to the disposition of their products they established a depot in New York and consigned their goods to Mr. John Clay, who was paid a salary instead of commission. A debit and credit account was kept with Mr. Clay. He accounted for sales in the same manner as a commission merchant does. The goods so consigned and sold and distributed were in the original packages. No jobbing business in articles manufactured by other parties was conducted. Parke, Davis & Company use in their laboratory large quantities of imported drugs. Mr. Clay having lived many years abroad, and being very familiar with foreign markets, it occurred to him he might import these drugs, and might incidentally import and dispose of more than the corporation required for their own use. They consented that this might be done, with the condition that "they would not invest a dollar of capital." This business in crude drugs was done chiefly on credit, and the drugs so imported were sold in the original packages, Mr. Clay however accounting to the corporation for any profits after being himself released from responsibility. As an incident of the business in crude drugs, some such drugs were purchased in the New York market, and some of these not required by the Detroit factory were resold. But the average of the total yearly sales of such purchases did not exceed $38,000. The average quantity of goods made in Michigan and carried in the original packages at the New York office was $50,000 value, and about the same amount

was carried of the crude drugs imported by Mr. Clay. The value of the plant used in New York for the conduct of the business did not exceed $15,000.

Upon this state of facts the Comptroller of New York imposed for 1894 and five previous years a tax for each of the years based upon $90,000 as "capital employed within the State," which was made the basis of the special State tax here in question, known as the franchise tax.

At the time of the imposition of this tax the provisions of the statute here drawn in question were as follows (Sec. 3, Chapter 542, Laws of 1880, as amended by Laws of 1881, Chap. 361; Laws of 1885, Chap. 359; Laws of 1889, Chaps. 193 and 353): "Every corporation, joint stock company, or association whatever, now or hereafter "incorporated, organized or formed under by or "pursuant to law in this State or in any other State "or country and doing business in this State, except "only saving banks and institutions for savings, life "insurance companies, banks, foreign insurance "companies, *manufacturing or mining corporations or companies wholly engaged in carrying on "manufacture* or *mining ores within this State*, "and agricultural and horticultural societies or "associations, which exceptions, however, shall not "include gas companies, trust companies, electric "or steam heating, lighting and power companies, "shall be liable to and shall pay a tax as a tax upon "its franchise or business into the State treasury "annually, to be computed as follows:"

Then come provisions grading the tax according to annual dividends. The tax originally fell upon the entire capital of a corporation, but the statute was amended in 1885 so as to read: "The amount of "capital stock *which shall be the basis* for tax under the provisions of section three (*supra*) in the case of every corporation, joint stock company and association liable to taxation thereunder shall be the

amount of capital stock employed within this State." * * *

Laws 1880, Chap. 542, Section 11, as amended by Laws 1885, Chap. 501.

Other facts and statutory provisions can be more satisfactorily stated in connection with a discussion of the legal questions.

ARGUMENT.

I.—This tax law as it stood prior to the amendments of 1885 has been the subject of consideration in this court in two previous cases.

Home Ins. Co. vs. *New York*, 119 U. S., 129; 134 U. S., 594.

Horn Silver Mining Co. vs. *New York*, 143 U. S., p. 306.

In the Home Insurance Company case the question was whether Government bonds held by the corporation could be treated as part of its capital upon which the tax could be computed. This Court held that such bonds were not exempt, because the tax was one imposed upon a corporate franchise conferred by the State. It is to be observed that the case arose prior to the amendment of 1885, which distinctively made the basis of the tax the capital employed within the State.

The Horn Silver Mining Company, though incorporated in Utah, had its corporate headquarters in New York. The stockholders, directors and other officers there conducted its operations. The bullion produced in Utah was not only sold in New York, but the proceeds were there used and loaned. In that case also the tax had been imposed under the statute as

it stood prior to the amendment of 1885. And this Court held that the tax was valid as one imposed upon the privilege given to a foreign corporation to carry on business in New York. The validity of taxes imposed by the States upon corporations is a matter which has been so often before this Court that the effort will be made in this argument to confine discussion to the distinctive points presented by this record. And the Court's attention is asked chiefly to questions now arising which were not presented nor involved in either of cases above mentioned.

II.—The statute as interpreted and enforced by the New York Court, (*a.*) Exempts corporations, foreign and domestic, which both manufacture and sell their products in the State; (*b.*) Thus imposes a discriminating tax upon these relators for selling in New York in the original packages their products made in Michigan.

To all intents and purposes Parke, Davis & Co. are told that to gain exemption from the tax they must move their laboratory from Detroit to New York.

It is believed that this discrimination comes within the prohibition of a line of authoritative decisions by this Court. No contention is here made that a corporation or individual of another State ought to gain any advantage over corporations or citizens in New York by the assertion of interstate commercial rights under the Federal Constitution. The learned Justice in the opinion in the State court (Record, pp. 28–30) wholly misapprehended the relator's contention. No occasion existed to combat the proposition held in *Paul* v. *Virginia*, 8 Wallace,

168, and in the other cases cited and reaffirmed in the *Horn Silver Case*, 143 U. S., 306.

It is not disputed by the defendant in error that at the time of the imposition of this tax Parke, Davis & Co. had complied with all the conditions entitling them to do business in New York, and had been subjected to such property taxes as were imposed upon other manufacturing corporations.

It was contended by us in the State court that by proper construction of the exemption clause in the statute all "manufacturing corporations" are exempt; that the words "*or companies wholly en-*" *gaged in carrying on manufacture or mining ores* "*within this State*" should be construed as exempting besides "manufacturing or mining "corporations" already specially exempted. "companies" which, though not technically incorporated as manufacturing or mining, or even incorporated for some other purpose, engaged in no business in New York other than manufacturing or mining. Such, for example, as certain transportation companies, which make their own wagons and implements, and packing companies which do nothing in New York but mine salt. This contention was overruled, the Court adhering to certain previous *dicta* that the legislative intent was to make the "*wholly engaged* in *manufacturing within the State*" the condition of the exemption.

The Court below disregarded the further contention there made, and here urged, that this construction and application of the statute involve an unjust and unconstitutional discrimination against the sale of goods made in another State.

The distinctively interstate commerce questions will be more fully considered later. But it is here to be observed, in passing, that the cases above cited make the reservation that the right of the States to exclude entirely foreign corporations is limited to such exclusion as does not impair the freedom of interstate commerce.

The same limitation has been recognized by the New York Court of Appeals in other cases. Thus in the *Pennsylvania R. R. Case*, 138 N. Y., p. 1, that Court held this same act unconstitutional in so far as it made the terminal property of the railroad in New York a basis of the tax, on the ground that such property was directly used in interstate commerce, And in an exhaustive opinion Chief Judge Andrews said (138 N. Y., pp. 6 and 7): "Corporations engaged "in both State and interstate commerce may law- "fully be subjected by the State to a franchise tax " measured by its whole capital or business, or in " any other way in the discretion of the Legislature, " without taking notice of the part of its business " arising from interstate commerce, *provided no* " *hostile discrimination is made against such part.*'

The cases in this Court chiefly relied upon as authorities for the proposition that a State cannot rightfully thus discriminate against goods of other States are,

Tiernan vs. *Rinker*, 102 U. S., p. 123,

where a Texas statute which taxed the business of selling liquors, but provided that it should not apply to wines or beer manufactured in the State, was held inoperative in so far as it was attempted to be applied to wines and liquors brought from other States and separately sold.

Walling vs. *Michigan*, 116 U. S., 446,

where a similar tax statute of Michigan was held void because making like discrimination against liquors, the products of other States.

Welton vs. *Missouri*, 91 U. S., 275,

where a license tax in Missouri was held unconstitutional because of its discrimination against the selling sewing machines made elsewhere.

In *Covert* vs. *Missouri*, 156 U. S., p. 296, the validity of the tax is sustained because the statute had been so amended as no longer to make such discrimination. In both these cases the Singer Sewing

Machine Co. was the real party in interest, the point being the validity of a tax upon the privilege of selling their machines in that State.

We also rely upon the line of cases, not distinctively tax cases, but where discriminating burdens have been put upon interstate business (*e. g.*):

Minnesota vs. *Barber*, 136 U. S., 313, where the sale of meats was prohibited unless the animals were submitted to State inspection before being slaughtered.

Brimner vs. *Rebman*, 138 U. S., p. 78, where a similar inspection, with incidental tax, discriminated against meats slaughtered more than one hundred miles from the place of sale.

In *Minnesota* vs. *Barber*, the contention was made that there was no unconstitutional discrimination, because all butchers were at liberty to bring their cattle within the State before slaughter. But this Court overruled this contention, which manifestly begs the whole question.

Voight vs. *Wright*, 141 U. S., 62, where a Virginia statute was held unconstitutional which compelled inspection of flour manufactured in other States, exempting from like inspection flour made in Virginia.

We rely also upon the reservation made in the decisions of this Court, sustaining franchise taxes. *e. g.:*

In *Postal Telegraph Co.* vs. *Adams*, 155 U. S., 689, where a franchise tax based on property within the State used for interstate commerce is held valid, being a tax *in lieu* of others directly upon the property. In 155 U. S., at page 696, the learned Chief Justice observes: "Doubtless no State could add to "the taxation of property according to the rule of "ordinary property taxation the burden of a license "or other tax on the privilege," &c.

And at page 698: "The taxation was neither ar-"bitrary nor discriminating."

In *Merchants' Bank* vs. *Pennsylvania*, 167 U. S., page 461, the Court held that a merely possible lack of uniformity is not fatal to the validity of a tax. "An option, which if not availed of by all may produce an inequality, is offered to all."

And in *Adams et al.* vs. *Ohio*, 165 U. S., 194, where the whole subject was so exhaustively argued and so fully considered by the Court, no discriminating tax was imposed upon the express companies.

III.—The learned Justice, writing the opinion in the State court, also misapprehended the contention made as to the relation of Mr. Clay to the business (see Record, p. 29). What we urged was that the corporation did not exercise in New York a corporate franchise as to certain portions of the business there conducted. Their sole corporate franchise is for manufacture and sale. They in fact sought in New York to exercise no other. But, assuming that the business of importing crude drugs and selling them in the original packages, as conducted by Mr. Clay, be corporate business, manifestly it is one which cannot be the basis of a State tax.

Brown vs. *Maryland*, 12 Wheaton, 419. This surely is a "franchise," guaranteed alike to individuals and corporations, free from State exaction.

We have here no occasion to dispute that property employed in such a business may in some way be subjected to its proper share in paying taxes for State governmental support. But taxation for the "franchise or business" of importing goods and once selling them is a power unequivocally surrendered by the States to the Federal Government.

IV.—It might be fairly contended that irrespective of the discriminating features here chiefly urged, the tax upon the franchise or business of selling their own goods in New York, imposed upon the relators is unconstitutional in the absence of a permission from Congress. This is a fair deduction from the original package cases in this court.

Leisy vs. *Hardin*, 135 U. S., 100.

And it is a proposition sustained by *Robbins* vs. *Shelby County*, &c., 120 U. S., page 489, and by *Cooper* vs. *Ferguson*, 113 U. S., 727.

In the latter case, in concurring in the result, Justices Matthews and Blatchford said: "It is quite "competent no doubt for Colorado to prohibit a for- "eign corporation from carrying on within that "State its business of manufacturing machinery, "but it cannot prohibit it from selling in Colorado "by contracts made there its machinery manufac- "tured elsewhere, for that would be to regulate com- "merce between the States."

In the *Horn Silver Company* case, 143 U. S., p. 306, that corporation claimed benefit from this line of decisions. In his brief in opposition, Attorney-General Tabor said (page 27 of his brief): "If the "plaintiff in error was simply selling its products "here (*i. e.* in New York) there would be, perhaps, "some force in the contention that the statutes un- "der consideration imposed a condition upon or "tended to regulate, interfere with or hamper the "sale of foreign goods or productions within the "principles of the cases cited."

He then proceeded to show, what was indisputable, that the Horn Silver Company not only made New York its corporate headquarters, but used in New York, for business benefits, the proceeds of bullion there sold.

The same state of facts has appeared in other cases in the State court, where the contention has been overruled, *e. g. People ex rel. Western Electric Co.*

vs. *Campbell*, 145 N. Y., 587; *People ex rel. Southern Cotton Seed Oil Co.* vs. *Wemple*, 131 N. Y., 64. In neither of these cases was it true, or pretended to be, that the corporations were not carrying on a general business in New York. In neither of them was the discriminating character of the exemption, hereinbefore considered, raised or applicable. The Southern Cotton Oil Company brought suit in the United States Circuit Court.

S. C. O. Company vs. *Wemple*, 44 Fed. Rep., 24.

It was manifestly an effort to gain exemption on the Interstate commerce theory, and thus have an advantage over domestic corporations subjected to the tax. The United States Circuit Court sustained the validity of the tax substantially in accordance with the rulings of this Court in the Horn Silver Case, the discriminating character of the tax not being presented.

V.—The tax here in question cannot be maintained as one imposed to reimburse the State for any police supervision over foreign corporations there selling their own goods.

By the terms of the statute the tax is payable into the State Treasury. And by Section 9, "The "taxes imposed by this act, and the revenue derived "therefrom, shall be applicable to the ordinary and "current expenses of the State."

Laws 1880, Chap. 542, Sec. 9, as amended by Laws 1881, Chap. 361.

The relators are a private corporation rendering no public service warranting special exactions. In *Charlotte R. R. Co.* vs. *Gibbs*, 142 U. S., p. 386, the question was as to the validity of a

tax, special in its nature, which was imposed to cover the expense of the South Carolina Railroad Commission. Mr. Justice Field took occasion to say: "If the tax were levied to pay for services in "no way connected with railroads, as, for instance, "to pay salaries of judicial and executive officers "of the State * * * there would be just ground "of complaint" (142 U. S., at p. 391).

So also certain regulations, not operating with entire uniformity, have been sustained because for the protection of the public.

VI.—Doubtless the patience of the Court has often been abused by efforts to extend beyond their fair scope the provisions of the Fourteenth Amendment prohibiting the denial to any person within the jurisdiction of a State "the equal protection of the law." This Court have often had occasion to call attention to the primary purpose of that amendment, which was aimed at discriminating race legislation. But that the provision may be invoked in behalf of corporations, as well as individual citizens, to prevent unfairly distributed burdens of taxation is not open to question.

And our contention is that these relators, having come within the jurisdiction of New York by compliance with all the provisions of law imposing conditions for transacting business within the State, are denied equal protection of the law when subjected to a tax from which are exempted other corporations, foreign and domestic, which wholly manufacture the same class of goods within the State.

The law as interpreted and enforced has all the attributes of a protective tariff. This is frankly, though perhaps unconsciously, recognized in the opinion of Chief Judge Andrews in the *Tiffany Case*, 144 N. Y., at page 171. (This case will be later referred to in another connection.) "The plain object

"of the exemption of manufacturing corporations "carrying on manufacturing in this State from "taxation by the Act of 1880, was the encourage- "ment of production, and it was assumed that the "employment of capital and labor in the business "of manufacture here was a just ground for the "exemption."

That a State may, by laws applying with uniformity to persons and classes of persons, including corporations and classes of corporations, encourage within its borders certain kinds of enterprise is not questioned. That it may exempt entirely from taxation certain kinds of property and certain classes of corporations has been frequently decided, and is not here questioned. But it cannot, under the guise of a franchise or business tax, give its own manufacturers special advantage in the business of selling their products.

VII.—Where, as here, exemptions are so incorporated in a tax law as to result in unconstitutional discrimination, the whole law falls.

Spraigue vs. *Thompson*, 118 U. S., pp. 90, 95.

And if the acts of State officials, under a law valid on its face, contravene the safeguards of the Constitution, such acts will be held invalid.

Yick Wo vs. *Hopkins*, 118 U. S., p. 356.

The method of the Comptroller in fixing this tax was palpably unjust. Assuming the relators to be subject to such a tax upon its franchise or business, the basis of it was the capital employed in the State in conducting such business. The value of the property used in conducting the business did not exceed $15,000 (Record, p. 22). In the first instance

the Comptroller fixed the "capital employed" at $100,000, and later reduced it to $90,000. Although the return to the writ does not disclose exactly how these figures were reached, it is obvious, and has hitherto been conceded, that the Comptroller considers the average stock of goods carried in the New York warehouse as a measure of "capital employed" in New York, although it was testified without contradiction that the proceeds of sales, less expenses, were in the course of business, remitted to Michigan, and that the stock carried in New York was there merely for convenience in distribution (Record, p. 20). It has been repeatedly held in the New York courts that the average stock of consigned goods is no measure of "capital employed."

See *People ex rel. Parker Mills* vs. *Commissioners*, 23 N. Y., p. 242.

It is only in a jobbing business that the average stock is any measure of capital employed. The place where a manufacturer employs his capital is the place where the raw material is converted into a finished product, here in the State of Michigan. Neither do the aggregate sales or expenses of sales furnish any test of "capital employed." The sales and expenses of the New York office shown in the record covered sales and expenses for the whole eastern section of the country, many sales being made in other States by traveling agents and merely registered at the New York office for convenience.

Such arbitrary and palpable disregard by a State officer of the legal and economic definition of the words "capital employed," amounts to a denial of due process of law, and a confiscation of private property for a public use without compensation.

VIII.—The learned Justice in the State court also misapprehended the application of the case. *People ex rel. Tiffany & Co.* v. *Campbell*, 144 N. Y., p. 166 (above referred to).

In that case the State sought to tax Tiffany & Co. upon the basis of their entire business. They claimed entire exemption because a "manufacturing corporation." The Court of Appeals modified the tax so as to exempt so much of the business as consisted in selling their own manufactures.

It was shown and conceded that the other business was *ultra vires*, but the Court held that the State not having interfered to prevent this *ultra vires* business, Tiffany & Co. were taxable upon it as a franchise which the State permitted them to exercise.

The case has no application here unless as bearing on the small and incidental business in selling certain crude drugs purchased in New York and not required by the relators for their own use. As already pointed out, this was done in connection with the importation of crude drugs by Mr. Clay. This Court has never adopted the New York doctrine as to *ultra vires* transactions, and where parties appeal to this Court for Federal protection against unfair State exaction, it seems that this Court may withhold assent from a doctrine that a State, on the plea of taxing a corporate franchise, can tax a business outside the franchise, practically conducted on an agent's individual responsibility.

The discriminating injustice of the tax here imposed is emphasized by the *Tiffany* decision, where the Court exempted from the tax the manufacturing part of the business. On this point the reasoning of the Comptroller's counsel here seems to be, "conceding, for argument, that you cannot rightfully "be taxed on the privilege of selling in New York "your own products, your agents do there a small "amount of business beyond that; therefore we "tax you on the basis of your entire business."

New York excludes many foreign banks from conducting banking business in the State. This has not been construed to prohibit individual bankers from acting in matters for which they are accountable to foreign banks as their principals. There is thereby no exercise in New York of the corporate banking franchise, the agents assuming individual responsibility for their acts. The Comptroller has not hitherto held that manufacturing corporations of other States are taxable in New York where they sell their goods through commission merchants in New York, though such merchants are known and recognized as agents of the corporations, and the latter retain title to the goods and their proceeds.

IX.—In substance the discriminating tax as here imposed was imposed upon goods brought into New York for sale in the original packages. The average stock of such goods was indisputably made the basis of the tax. It has been repeatedly held in this Court that a tax upon the distinctive business or franchise of selling such goods is a tax upon the goods.

True, in the *Home Insurance Co.* case, 119 U. S., 133; 134 U. S., 594, it was held that the tax being one upon the corporate franchise was not a tax upon the Government bonds, which were a part of the capital. The cases, however, are entirely different. The business there taxed was an insurance business. The Government bonds held were part of a permanent capital and used as such capital. They were credited to the company by the State as part of the reserve which measured the volume of its insurance business.

The Court therefore held that the Government bonds were merely a factor in the computation of a tax which was imposed not upon them but upon something else which the State could lawfully tax.

In the income tax cases the learned Attorney-General earnestly contended that this principle was applicable; that the tax was imposed upon citizens, the income being a mere measure of the tax; that it was not imposed upon property which was the source of the income; but the Court declined to sustain that contention. Here the tax is imposed directly, *first*, upon a privilege or franchise which is exempted when exercised by corporations manufacturing within the State; and, *second*, it is made to fall upon property which the relators have a right to sell free from any such discriminating imposition.

The case of *Pembina Mining Co.* vs. *Pennsylvania*, 125 U. S., 181, has been appealed to as a decision upholding a State license tax similar to this. But the decision in that case was essentially like that in the *Horn Silver*. The statute exacted a license fee for having an office in the State for the use of the "officers, stockholders, agents or em-"ployees." In the opinion sustaining the validity of the tax Mr. Justice Field observed: "No tax upon "the franchise of the foreign corporation is levied, "nor upon its business or property without the "State. A license tax only is exacted as a condi-"tion of its keeping an office within the State for "the use of its officers, stockholders, agents and "employees. Nothing more. Nothing less" (125 U. S., 186).

As concisely stating the distinctive contentions here made on behalf of the plaintiff in error, the Court's attention is asked to the language of Mr. Justice Bradley in the case *Brown* vs. *Houston*, 114 U. S., at p. 622. The Court in that case held that a cargo of coal shipped from Pennsylvania to New Orleans was not exempt from an assessment laid upon it under the Louisiana law In illustrating the rule Mr. Justice Bradley observed: "It cannot "be seriously contended, at least in the absence of "any congressional legislation to the contrary, "that all goods which are the products of "other States are to be free from taxation

"in the State to which they may be carried "for use or sale. Take the City of New York, for "example. When the Assessor of Taxes goes his "round must he omit from his list of taxables all "goods which have come into the city from the "factories of New England and New Jersey or "from the pastures and grain fields of the West? "If he must, what will be left for taxation? And "how is he to distinguish between those goods "which are taxable and those which are not? With "the exception of goods imported from foreign "countries still in the original packages, and goods "in transit to some other place, why may he not "assess all property alike that may be found in the "city, being there for the purpose of remaining "there till used or sold, and constituting part of the "great mass of its commercial capital, *provided "always that the assessment be a general one, and "made without discrimination between goods the "product of New York and goods the product of "other States? Of course the assessment should "be a general one, and not discriminative between "goods of different States*" (114 U. S., p. 633).

X.—The judgment of the New York Supreme Court should therefore be reversed and the case remanded with instructions accordingly.

Respectfully submitted,

JAMES MCKEEN,
Of Counsel to Relators, Plaintiff in Error.